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No. 80-1624

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, divisees, legatees, and assignees of NELLIE F. GILL, deceased,
Appellants,

-vs-

H. JOHN VAN SLOOTEN,
Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May the State of Michigan, consistent with the due process clause of the Fourteenth Amendment, divest one person of title to an oil and gas interest in real estate and give it to another, without providing notice, an opportunity to be heard, or compensation to the person from whom the property has been taken?

PARTIES TO PROCEEDINGS BELOW

By order of the Michigan Supreme Court, this case and a second case raising similar issues, *Bickel, et al* v *Fairchild, et al*, were consolidated. The appeal in *Van Slooten* v *Larsen, et al* is the sole proceeding encompassed by this Jurisdictional Statement, although the *Bickel* appeal has also been submitted to this Court. All of the parties to the *Van Slooten* appeal below are listed in the caption of the appeal to this Court.

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OPINIONS BELOW

The Opinion of the Michigan Supreme Court appears at 410 Mich 21; 299 NW2d 704 (1980). The Opinion of the Michigan Court of Appeals in the *Van Slooten* case is found at 86 Mich App 437; 272 NW2d 675 (1978). Those Opinions are attached to this Brief as Appendices A and B, respectively. The Judgment of the Michigan Circuit Court for Kalkaska County is reprinted at Appendix D.

JURISDICTION

The proceedings below were commenced in the Kalkaska County Circuit Court, Michigan, to quiet title to certain oil and gas rights. Appellants defended by challenging the constitutionality of the statute under which Plaintiffs claimed title to the rights in question. The trial court ruled that the statute was unconstitutional, but the Michigan Court of Appeals reversed.

On December 23, 1980, the Michigan Supreme Court entered final judgment reversing the Court of Appeals and upheld the Michigan statute against challenges based upon the Michigan and United States Constitution. A Notice of Appeal was filed March 12, 1981 in the Michigan Supreme Court. Jurisdictional with this Appeal from the Michigan Supreme Court's judgment is conferred by 28 USC Section 1257(2), 1976.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Michigan Dormant Mineral Act, Michigan Compiled Laws, Sections 554.291-554.294 (captions supplied by compiler):

554.291 Oil or gas interest in land; abandonment; claim of interest; vesting in surface owner.

Section 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or the use of such interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer or record of such interest or within 20 years after the last issuance of a drilling permit as to such interest or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership. Drilling permit. The phrase "drilling permit" shall mean a permit to drill an oil or gas well issued by the conservation department or its successor. PA 1963, No. 42 § 1, Eff Sept. 6.

554.292 Preservation of oil or gas interest; recording of notice of interest claimed.

STATEMENT OF THE CASE

This action to quiet title was filed in the Kalkaska County, Michigan, Circuit Court by H. John Van Slooten. Named as Defendants were the heirs of Nellie F. Gill. The parties stipulated as to the pertinent facts, which are here set forth in narrative form.

The property which is the subject of this action is located in West Kalkaska Township, Kalkaska County, Michigan. Nellie F. Gill, ancestor of all the known Defendants to this action, by warranty deed dated April 23, 1943 conveyed the surface rights but excepted from that deed and reserved unto herself and her heirs all of the oil and mineral rights to the property. This deed was recorded August 7, 1945. Through mesne conveyances, H. John Van Slooten acquired title to the surface of the property by quit claim deed dated January 2, 1959 and recorded January 26, 1959. On June 29, 1970, an oil and gas lease from Elsie M. Dick, one of the Defendants to Pan American Petroleum Corporation was recorded in the Kalkaska County Records. Thereafter all of the Defendants or their ancestors executed oil and gas leases in favor of Pan American Petroleum Corporation or its successor in interest, Amoco Production Company. Neither Nellie F. Gill nor her heirs have recorded a written notice in the Register of Deeds Office for Kalkaska County during the 20 year period immediately following August 7, 1945 nor during the 3 year period immediately following September 6, 1963, stating that they, or any of them, desired to preserve their mineral estate and did not intend to abandon it.

Because there is a producing well on the property in question, the parties stipulated and the trial court ordered that the royalties, now totalling in excess of $100,000.00, be placed in escrow.

The premise underlying H. John Van Slooten's claim to the mineral estate of the Kalkaska County property is the Michigan Dormant Minerals Act, MCLA 554.291 through MCLA 554.294. That statute, which was passed in 1963, provides that "any interest in oil or gas in any land" shall be taken from the subsurface owner and given to the surface owner unless, within the prior 20 years, (1) it has been sold, leased, mortgaged, or transferred by recorded instrument; (2) a drilling permit has been awarded to explore for such oil or gas; (3) "actual production" or withdrawal of oil or gas has occurred; (4) the lands in question have been pooled, unitized, or otherwise included in a plan of unit operation; or (5) the area has been used for the underground storage of gas.

The act was not made immediately effective as to properties where the mineral estate had been severed prior to its enactment. Instead, subsurface owners or those claiming through them were given 3 years following the statute's effective date to register their interest. Thereafter, failing such registration, the Michigan statute automatically vests title to the subsurface in the surface owner. The statute affords no notice, even by publication, in forming subsurface owners that their rights are in jeopardy. It operates without the benefit of any process, judicial or administrative. It provides for no payment of compensation.

In the proceedings below, it was conceded that the Appellants had not performed any of the acts enumerated in the statute prior to its enactment nor had they fulfilled the registration requirement in the three years that followed. The only issue presented for decision below was the constitutionality of the statute under both the Michigan and federal constitutions.

The trial court granted Appellants' motion for summary judgment and ruled that the Dormant Mineral Act was unconstitutional. The Michigan Court of Appeals reversed the trial court's judgment, and in a 4-3 decision, the Michigan Supreme Court affirmed.

The following arguments presented to this Court on Appellants' behalf are virtually identical to those contained in the brief of the Appellants in the companion case of *Bickel* v *Fairchild, supra*. Appellants in the instant case acknowledge the source of the material and appreciate the permission received from E. Edward Bruce and Thomas William Mayo of Covington and Burling and John H. Norris of Monaghan, Campbell, LoPrete, McDonald and Norris to utilize their arguments.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal raises important issues under the Fourteenth Amendment that have been decided in a conflicting manner by the highest courts of six states. In recent years, a number of states have passed dormant mineral legislation.[1] In four, the legislation has been invalidated under the federal constitution.[2] The highest courts of Indiana and Michigan, on the other hand, have upheld such legislation.

This Court has recently been presented with appeals from the decision of the Indiana Supreme Court upholding that state's version of a Dormant Mineral Act.[3]

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[1] *See* Fla. Stat. Ann. § 704.05 (Supp. 1978); Ga. code § 85-407.1 (1978); Ill. Rev. Stat. ch. 30, §§ 197-98 (1973) (held unconstitutional); Ind. Code §§ 32-5-11-1 to 8 (1976); Mich. Comp. Laws § 554.291 (1970); Minn. Stat. Ann. §§ 93.92 et seq. (held unconstitutional); Neb. Rev. Stat. § 57-229-230 (1974) (held unconstitutional); N.C. Gen. Stat. § 1-42.1 (1969); Tenn. Code Ann. § 64-704 (Supp. 1978); Fa. Code § 55-154 1974); Wis. Stat. § 700.30 (1978) (held unconstitutional).

[2] *See* discussion at p. . *infra*.

[3] *Texaco, Inc.* v *Short*, No. 80-965 (appeal docketed Dec. 19, 1980, *Pond* v *Walden*, No. 80-1018 (appeal docketed Dec. 19, 1980—, appealing from *Short* v *Texaco, Inc.*, Ind. , 406 NE2d 625 (1980)

However, the appellants in that case made only the most fleeting reference to the issue to which the largest portion of this jurisdictional statement is devoted: the operation of a Dormant Mineral Act as an unconstutitional taking under the Fourteenth Amendment. Instead, appellants there rested their argument principally upon claims of procedural due process. Unless those appeals result in summary invalidation of the Indiana law on grounds broadly applicable to the Michigan Statutes, this case should be set for full oral argument.

The same can be said as to the other state Supreme Court opinions that have struck down this type of legislation. In every prior case, there has been a discussion of procedural due process either without a recognition of the substantive taking question or without a clear exposition of that issue. Only through an analysis of the taking question can this Court bring some order to the by now chaotic collection of state court decisions involving Dormant Mineral Acts.

I.

> "THE PERTINENT WORDS OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES ARE THE FAMILIAR ONES: 'NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.' THAT PROHIBITION, OF COURSE, APPLIES AGAINST THE STATES THROUGH THE FOURTEENTH AMENDMENT."

Webb's Fabulous Pharmacies, Inc. v *Beckwith*, 101 S Ct 446, 450 (1980).

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[4] Indeed, the Michigan statute goes beyond the taking condemned in *Kaiser Aetna*, since it gives the surface owner the right to exclude the mineral estate holder from the use of his own property.

By its Dormant Mineral Act, Michigan takes the title to the property of one individual and gives it to another without any pretense of providing the procedural and substantive rights that constitutionally are required in eminent domain proceedings. The statute takes, in the words of *Andrus* v *Allard*, 444 US 51, 66 (1979), the "full 'bundle' of property rights" possessed by a mineral estate owner, not merely "one 'strand' of the bundle." In prohibiting the subsurface owner's "right to exclude" the surface owner from access to any oil or gas underlying the real estate, it takes what is "universally held to be a fundamental element of the property right (that) falls within this category of interests that the government cannot take without compensation." *Kaiser Aetna* v *United States*, 444 US 164, 179-80 (1979) (footnote omitted).[4] These and other cases involving lesser invasions by the state of property rights *a fortiori* show the unconstitutionality of the Michigan Dormant Mineral Act.

Pennsylvania Coal Co. v *Mahon*, 260 US 393 (1922), recently described by this Court as the "leading case" in this area,[5] is most instructive. *Mahon* also dealt with severed mineral interests and the claims of surface owners. There, a Pennsylvania statute prohibited the mining of coal by a mineral estate owner, if such activities threatened to cause subsidence that might endanger the surface owner. Although recognizing that the state could be concerned with public safety under such circumstances, the Court struck down the Pennsylvania statute, because "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414.

Mahon applies *a fortiori* here. There, nominal title was left in the coal company, but in order to benefit the surface owner, it was prevented from productively using its prop-

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[4] See footnote 4 page 6.

[5] *Penn Central Trans. Co.* v *New York City*, 438 U.S. 104, 127 *reh. denied*, 439 U.S. 883 (1978)

erty. Here, in order to effect what Michigan considers to be a valid public policy, title is actually taken from the mineral estate owner and is transferred to the surface owner. Thus, as in *Mahon*, "there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413.

That the direct beneficiaries of the Michigan statute are private parties, rather than the state itself, does not make it any less a taking. The same was true in *Mahon*. Moreover, the Court's recent opinion in *Northern Cheyenne Tribe* v *Hollowbreast*, 425 US 649 (1976), was premised upon the assumption that the transfer of title to severed mineral interests from one group of private parties to an Indian tribe pursuant to federal legislation would constitute a taking by the United States, if the person from whom these rights were taken had vested interests. *See* 425 US at 651-52. And in *Regional Rail Reorganization Act Cases*, 419 US 102, 148-155 (1974), this Court recognized that the statutorily directed transfer of railroad properties to Conrail—"basically a private, not a governmental, enterprise," *Id.* at 152—could "indeed be taking of private property for public use." *Id.* at 155. *See also Berman* v *Parker*, 348 US 26, 33-34 (1954).

The Michigan Supreme Court upheld the Michigan statute against Appellants' constitutional challenge by posing the question "whether it was a proper exercise of the state's police powers", 410 Mich at 42, and by placing upon Appellants the burden of "prov[ing] either that no public policy is served by the Act or that no reasonable relationship exists" between it and the public purpose that it sought to achieve, 410 Mich at 42-43. Posing the wrong question, the Michigan court reached the wrong result.

Whether or not the Michigan Act is reasonably related to a valid public purpose, the fact remains that the legislature has used that purpose to define the type of mineral interest that the state desire to take from certain property owners and give to others. Michigan has, by statute, identified five

criteria as indicating that particular mineral estates would, in its judgment, more likely be developed if placed in the hands of the surface owner. This is not different than Michigan's definition by statute of a particular kind of property that could best be used as a right-of-way for public highway. Even assuming Michigan had wisely chosen the right location for the highway, or here has properly identified the kind of mineral estate that might be better developed by someone else, it has merely established the public purpose to be served by the taking.

The definition of the public purpose to be served by a taking is properly a legislative question. *North Laramie Land Co.* v *Hoffman*, 268 US 276, 282-83 (1925). But even a sound legislative declaration of the purpose to be served by a taking does not negate the need for the notice, hearing, and just compensation that constitutionally must accompany the taking. These requirements of the due process clause cannot be avoided by legislative declarations as to the need for the taking.

Any attempt to liken the Michigan statute to common-law abandonment must be rejected. Indicia of abandonment are merely evidence of a surface owner's intention to relinquish his property and make it available to another. *Cf. Baglin* v *Cusenier Co.*, 221 US 580, 597-98 (1911). By contrast, an oil and gas estate owner's decision not to develop the resource may be a function of economic or other considerations. Certainly such inactivity does not bespeak an intention to abandon the property.

The Michigan Supreme Court squarely held that the Michigan Act was not based on such an evidentiary presumption:

> "[T]he act does not create any evidentiary presumption. None of the provisions of the act purport to be concerned with the owner's intent to abandon. . . . Rather, the act is designed to increase the marketability and development of severed mineral interests

> by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years." (Citation omitted). 410 Mich at 50-51.

The state court's construction of the Michigan statute is, of course, binding on this Court. *See, e.g., Webb's Fabulous Pharmacies, Inc.* v *Beckwith, supra*, 101 S Ct at 450; *Standard Oil Co.* v *New Jersey*, 341 US 428, 432 n.2 (1951), and cases cited therein.

Finally, it is clear that the Michigan court's reference to recording acts is inopposite. 410 Mich at 47 et seq. Under a recording act, a subsequent *bona fide* purchaser's title to property is deemed superior to that of a prior purchaser who failed to record the deed or other instrument evidencing the transaction upon which he bases his claim of ownership. The recording act does not take the entire "bundle of rights" from the prior purchaser; he is left with a cause of action against the seller. *Compare Penn Central Transportation Co.* v *New York City, supra*, 432 US at 137. The Dormant Mineral Act, by contrast, deprives owners of oil and gas properties of every vestige of ownership.[6]

In sum, Michigan has purported to encourage oil and gas development through the taking of private property without observing the procedural or substantive safeguards associated with eminent domain proceedings. By upholding the legislature's choice of means in this case, the Michigan Supreme Court fell into the "danger of forgetting that a strong public desire to improve the public condition is not

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[6] The Michigan Supreme Court's reliance upon *Jackson* v *Lamphire*, 28 U.S. 280 (1830), 410 Mich at 47 to sustain the constitutionality of applying a recording act to void a deed which preceded the act is of no significance for an additional reason. As the lower court recognized, *Jackson* was decided prior to adoption of the Fourteenth Amendment and was based upon the contract clause of the federal Constitution. A state's power to impair contracts is measured by a less stringent standard than its power to take property under the Fourteenth Amendment. *Compare Home Building & Loan Ass'n* v *Blaisdell*, 290 U.S. 398 (1934), *with Pennsylvania Coal Co.* v *Mahon*, supra, 260 U.S. 393.

enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v *Mahon, supra*, 260 US at 416.

II.

Even if the Court does not agree that the State of Michigan can accomplish its stated goals only through the eminent domain power, the Dormant Mineral Act unconstitutionally fails to provide for the notice and opportunity to be heard that this Court has prescribed for deprivations of property that do not rise to the level of a taking.

Mullane v *Central Hanover Bank & Trust Co.*, 339 US 306 (1950), is the leading case in this area. There, the Court required personal notice for individuals readily identifiable and notice by publication for all others prior to the appointment of a trustee to manage certain trust assets. As the Court explained, "[An] elementary and fundamental requirement of due process in any proceeding which is be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

Thus, even if its operation does not result in an uncompensated taking, the Dormant Mineral Act is fatally deficient. It effects a destruction of title, not merely an appointment of a trustee, without notice of any kind. Absent owners are given no opportunity to appear in any proceeding "to present their objections" before their property is taken from them.

This Court's review of cases involving state escheat statutes validates this reading of *Mullane*. *See Standard Oil Co.* v *New Jersey*, 341 US 428 (1951); *Anderson National Bank* v *Luckett*, 321 US 233 (1944); *Security Savings Bank* v *State of California*, 263 US 282 (1923). In these cases, various statutes provided that certain "dormant" property—inactive bank accounts, unclaimed dividends, or the like—would escheat to the state after the passage of a specified number of years. In each case, however, this Court has made it clear that escheat statutes must

provide notice and an opportunity for the absent owner to appear and declare his or her interest in the property at issue. Thus, in *Anderson National Bank, supra*, the Court stated, "[o]ur inquiry must be directed to the question whether the procedure by which the state undertakes to acquire the depositers' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard." 321 US at 243. *See also Standard Oil Co.* v *New Jersey, supra*, 341 US at 432-35; *Security Savings Bank* v *State of California, supra*, 263 US at 287.

Plainly, Michigan's Dormant Mineral Act produces a deprivation of property that is at least as complete as that brought about by an escheat statute. It should, therefore, be subject to the same constitutional limitations.

III.

With its decision in this case, the Michigan Supreme Court becomes the second state court of last resort to uphold a dormant mineral statute in the face of a substantial challenge on federal constitutional grounds. The highest courts of four other states, on the other hand, have invalidated similar legislation under the Fourteenth Amendment. See *Wilson* v *Bishop*, 82 Ill. 2d 364, 412 NE2d 522 (1980); *Contos* v *Herbst*, Minn , 278 NW2d 732, *appeal dismissed sub nom.*, 444 US 804 (1979); *Wheelock* v *Heath*, 201 Neb 835, 272 NW2d 768 (1978); *Chicago & North Western Transportation Co.* v *Pedersen*, 80 Wis 2d 566, 259 NW2d 316 (1977).

In addition, at least four other states—Florida, Georgia, Tennessee, and Virginia—have enacted dormant mineral legislation. *See* note, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 Ind L Rev 455, 459 n. 19 (1979). Thus, the potential exists for further conflicts among the states. The existence of a substantial federal question as to which the state courts have reached and may continue to reach contradictory conclu-

sions is compelling reason for granting plenary review. *See Webb's Fabulous Pharmacies, Inc.* v *Beckwith, supra, 101 S Ct at 449-50; Fuller* v *Oregon,* 417 US 40, 42 (1974). See also *Citizens & Southern National Bank* v *Bougas*, 434 US 35, 37 (1977); *United States* v *Oregon*, 366 US 643, 645 (1961); reh. denied, 368 US 870 (1961).

CONCLUSION

For the reasons recited above, this Court should grant this appeal and hear this case on the merits.

Respectfully submitted,
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APPENDIX A

The Opinion of the Michigan Supreme Court is contained in the Appendix attached to this jurisdictional statement of Appellants in the companion case of *Bickel* v *Fairchild*. In accordance with a policy of brievity in appendices, and to avoid duplication, Appellants have elected to omit that Opinion in their Brief.

86 Mich App 437
Van Slooten v Larsen
(Oct. 1978)

APPENDIX B

Docket No. 77-1991. Submitted February 9, 1978, at Lansing—Decided October 17, 1978. Limited leave to appeal granted, 405 Mich 824.

H. John Van Slooten brought an action in Kalkaska Circuit Court against Myrtle Larsen and other defendants to quiet title to certain subsurface oil and gas interests. In 1943 Nellie Gill, owner of 40 acres, conveyed the parcel, excepting and reserving to herself and her heirs all of the oil and mineral rights. The deed conveyance was recorded in 1945. One of the defendants recorded an instrument affecting an interest in the rights reserved to the Gill heirs in 1970, other defendants recorded later. Plaintiff is the successor in interest of the grantee of the deed. Nellie Gill is now deceased and the defendants are her heirs. William R. Peterson, J., ruled that the dormant minerals act is unconstitutional as applied to these defendants because it deprived the defendants of property without due process of law and impaired the

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References for Points in Headnotes

[1, 7, 8] 38 Am Jur 2d, Gas and Oil §§54, 208-213. 54 Am Jur 2d, Mines and Minerals §§119,147.

[2] 54 Am Jur 2d, Mines and Minerals §§103, 108-110.

[3, 4, 9] 16 Am Jur 2d, Constitutional Law §§292, 296, 301, 368-370.

[5, 6] 16 AM Jur 2d, Constitutional Law §§281-283, 318.

[6] 54 Am Jur 2d, Mines and Minerals §§2, 20, 31, 167.

[10] 16 Am Jur 2d, Constitutional Law §§434, 450-452.

[11-13] 16 Am Jur 2d, Constitutional Law §§298-301.

[14] 16 Am Jur 2d, Constitutional Law §495.

obligation of defendants' contract with plaintiff. Judgment for defendants. Plaintiff appeals. *Held:*

1. Oil and gas interests owned by a nonsurface owner may be abandoned if no specified activity occurs within a 20-year period. Defendants failed to file a notice of a claim of interest within 20 years; therefore, title vests in plaintiff as surface owner of the land.

2. The clear and valid public purpose of the dormant minerals act is to encourage exploration for, and extraction of, needed oil and gas.

3. The dormant minerals act is not arbitrary or capricious because there is a rational connection between an oil and gas owner's inaction and the presumption of abandonment.

4. Enforcement of the dormant minerals act is a valid exercise of police power.

5. The dormant minerals act does not unconstitutionally impair the obligations of contract.

Reversed and remanded.

1. MINES AND MINERALS—DORMANT MINERALS ACT—OIL AND GAS INTERESTS—SUBSURFACE OWNERS—ABANDONMENT—PRESERVATION OF INTERESTS—STATUTES.

The dormant minerals act provides that when the ownership of subsurface oil and gas interests is severed from the ownership of the surface, the owner of oil and gas rights must do some act, enumerated in the statute, to indicate ownership or the oil and gas interests are deemed abandoned and become the property of the surface owner (MCL 554.291 *et seq.*; MSA 26.1163[1] *et seq.*).

86 Mich App 437
Van Slooten v Larsen
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2. MINES AND MINERALS—SUBSURFACE OWNERS—SEVERANCE OF INTERESTS—RESERVATION IN DEED.

The ownership of subsurface mineral interests may be severed from ownership of the surface by a reservation in a deed.

3. CONSTITUTIONAL LAW—DEPRIVATION OF PROPERTY—DUE PROCESS—POLICE POWER.

The provision of the constitution declaring that property shall not be taken without due process of law is inapplicable where there is a valid exercise of police power.

4. CONSTITIONAL LAW—POLICE POWER—COURTS—STATUTES—EVALUATION OF STATUTES—FLEXIBILITY—CHANGE OF SOCIAL CONDITIONS.

Courts have remained flexible in evaluating various statutes in the light of evolving social conditions when determining what constitutes a valid exercise of police power; they have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power because police power is elastic and is exercised from time to time as varying social conditions demand correction.

5. CONSTITUTIONAL LAW—POLICE POWER—LEGISLATIVE JUDGMENT—PUBLIC PURPOSE.

Courts give great deference to the legislative judgment in passing on the validity of police power legislation; generally, there is a two-step inquiry: (1) whether there is a valid public purpose, and if so, (2) is there a reasonable relationship between the remedy adopted and the public purpose.

86 Mich App 437
Van Slooten v Larsen
(Oct. 1978)

6. MINES AND MINERALS—DORMANT MINERALS ACT—OIL AND GAS—PUBLIC PURPOSE—EXPLORATION AND EXTRACTION.

The clear and valid public purpose of the dormant minerals act is to encourage exploration for, and extraction of, needed oil and gas.

7. MINES AND MINERALS—DORMANT MINERALS ACT—OIL AND GAS—SUBSURFACE OWNERS—PRESERVATION OF INTERESTS—ABANDONMENT—PRESUMPTIONS.

The dormant minerals act creates a rebuttable presumption that the owner of subsurface rights has abandoned them if he or she has done nothing to indicate ownership; the presumption is rebutted by the owner doing any one of a number of acts which would indicate ownership sometime within a twenty-year period; the requirements of the act place a minimal burden on the owner of the oil and gas rights to do something to indicate ownership and if the owner fails to carry that minimal burden, the law deems his rights abandoned; in essence, the act creates a statutory conclusive presumption of abandonment which may not be rebutted by other evidence.

8. MINES AND MINERALS—DORMANT MINERALS ACT—OIL AND GAS—SUBSURFACE OWNERS—ABANDONMENT OF RIGHTS—STATUTES—PRESUMPTIONS—APPEAL AND ERROR—ARBITRARY OR CAPRICIOUS STANDARD.

Conclusive presumptions established by statute are reviewed under the arbitrary or capricious standard; the conclusive presumption that a subsurface owner of oil and gas rights has abandoned those rights by failing to indicate ownership within twenty years, as established by the dormant minerals act, is not

arbitrary or capricious because there is a rational connection between an oil and gas owner's inaction and the presumption of abandonment.

9. MINES AND MINERALS—DORMANT MINERALS ACT—ENFORCEMENT—POLICE POWER.

Enforcement of the dormant minerals act is a valid exercise of police power.

10. CONSTITUTIONAL LAW—CONTRACTS—IMPAIRMENT OF CONTRACTUAL OBLIGATIONS—BALANCING TEST.

The constitutional limitation on a state's power to impair the obligation of contract is not to be read with mathematical exactness since it is not every modification of a contractual promise that impairs the obligation of contract; in each case where there is an alleged impairment of the obligation of contract, the state's economic interests and sovereign right to protect the general welfare of the people must be balanced against the constitutional limitation.

11. CONSTITUTIONAL LAW—POLICE POWER—STATE'S ECONOMIC INTERESTS—INTERFERENCE WITH CONTRACTS.

The economic interests of a state may justify the exercise of its continuing and dominant protective power, notwithstanding interference with contracts.

12. CONSTITUTIONAL LAW—POLICE POWER—CONTRACTS.

A state enactment is not prohibited where there is a valid exercise of a state's police power which only incidentally affects an existing contract.

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13. CONSTITUTIONAL LAW—DORMANT MINERALS ACT—CONTRACTS—IMPAIRMENT OF CONTRACTS.

The dormant minerals act does not unconstitutionally impair the obligations of contract.

14. CONSTITUTIONAL LAW—DORMANT MINERALS ACT—EQUAL PROTECTION.

The equal protection clause does not require the Legislature to choose between addressing every aspect of a problem or not addressing the problem at all; the fact that the dormant minerals act only applies to high priority gas and oil and not other minerals is not a violation of equal protection.

Thompson, Zirnhelt & Bowron (by *Peter J. Zirnhelt* and *Kenneth T. Bovee*), for plaintiff.

Dreyer & Braeuninger, for defendants.

Before: N.J. KAUFMAN, P.J., and D.E. HOLBROOK, JR. and D.F. WALSH, JJ.

D.E. HOLBROOK, JR., J. Plaintiff appeals from the trial court's ruling that the so-called "dormant minerals act", MCL 554.291 *et seq.*; MSA 26.1163(1) *et seq.*, violated both the Federal and state constitutions by depriving defendants of property without due process of law. Further the trial court held that the act impaired the obligations of defendants' contract with plaintiff contrary to art I, § 10 of the Michigan Constitution of 1963 and art I, § 10 of the United States Constitution.

The case was submitted on stipulated facts and the only issue was the constitutionality of the dormant minerals act. In 1943 Nellie Gill, the owner of 40 acres of land in Kalkaska County, conveyed the parcel "excepting and

reserving to herself and her heirs all of the oil and mineral rights * * *". The deed of conveyance was recorded on August 7, 1945. Plaintiff, H. John Van Slooten, is the successor in interest of the grantee of the deed. Ms. Gill is now deceased and the defendants are her heirs.

On June 29, 1970, one of the defendants recorded an oil and gas lease. This was the first recorded instrument affecting or asserting an interest in any of the rights reserved to heirs in the Gill deed. After the recording of this initial lease, all of the defendants or their ancestors executed oil and gas leases.

It is undisputed that neither Ms. Gill nor her heirs have recorded any written notice with the county register of deeds nor have any drilling permits been issued in the 20 year period following the recordation of the Gill deed on August 7, 1945, or in the three-year period following September 6, 1963.

The relevance of the three- and 20-year periods can be seen in the statutory sections, MCL 554.291 and 554.292; MSA 26.1163(1) and 26.1163(2).

> "554.291 Oil or gas interest in land; abandonment; claim of interest; vesting in surface owner.
>
> "Sec. 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized

or included in unit operations therewith, or the use of such interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer of record of such interest or within 20 years after the last issuance of a drilling permit as to such interest or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership.

"Drilling permit. The phrase 'drilling permit' shall mean a permit to drill an oil or gas well issued by the conservation department or its successor.

"554.292 Preservation of oil or gas interest; recording of interest notice claimed.

"Sec. 2. Any interest in oil or gas referred to in this act may be preserved by the recording within the period specified in this act a written notice in the register of deeds office for the county where such interest is located, which notice shall be verified by oath, describe the land and the nature of the interest claimed, give the name and address of the person or persons claiming the interest, and state that such person or persons desire to preserve the interest and do not intend to abandon same: Provided, however, That any person holding such

interests for use in underground gas storage operations may preserve his interests, and the interests of any lessor thereof, by recording a single such written notice, defining the boundaries of the underground gas storage field or pool, and the formations included therein, within which said interests are located, without the necessity of describing each separate interest claim therein by said person. The recording of such notice shall operate to preserve such interest from the operation of this act for a period of 20 years thereafter when, if the nondormant character of the interest has not been evidenced by sale, lease, mortgage or transfer by instrument recorded in the register of deeds office for the county where such interest is located, a drilling permit issued, oil or gas actually produced or withdrawn from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, or a like notice filed, such interest shall be deemed abandoned. In the absence of prior abandonment, such interests may be preserved indefinitely from the operation of this act by the filing of the notices as herein provided or the performance of any of the acts specified herein evidencing nondormancy of the interest within each succeeding 20 year period.

"Nonapplication of act. This act shall not apply to any interest in oil or gas owned by any governmental body or agency thereof." 1963 PA 42, § 2, eff. Sept. 6.

Essentially the act provides that when the ownership of subsurface oil and gas interests is severed from the ownership of the surface, the owner of oil and gas rights must do some act, enumerated in the statute, to indicate ownership or the oil and gas interests are deemed

abandoned and become the property of the surface owner. The trial court found this legislative scheme to be unconstitutional since it deprived the defendants of property without due process of law and impaired the obligations of contract between plaintiff and defendant. On appeal, defendants also claim the statute deprives them of equal protection of the law.

We begin by noting that there is no question that ownership of subsurface mineral interests may be severed from ownership of the surface by a reservation in a deed. *Rathbun* v *Michigan*, 284 Mich 521, 534; 280 NW 2d 35 (1938). That is the situation in the instant case.

While defendants and the trial court have focused on the issue of whether the statute deprives defendants of property without due process of law, Michigan courts have held that where there is a valid exercise of the police power, the provision of the constitution declaring that property shall not be taken without due process of law is inapplicable. *Wyant* v *Director of Agriculture*, 340 Mich 602, 608; 66 NW2d 240 (1954), *Grayson* v *Board of Accountancy*, 27 Mich App 26, 30; 183 NW2d 424 (1970), *People* v *Raub*, 9 Mich App 114, 118; 155 NW2d 878 (1967). Therefore if the dormant minerals act is a valid exercise of police power, defendants have not been deprived of property without due process of law.

In determining what constitutes a valid exercise of police power, courts have remained flexible in evaluating various statutes in light of evolving social conditions. In *Clements* v *McCabe*, 210 Mich 207, 215; 177 NW 722 (1920), the Michigan Supreme Court stated,

> "The governmental authority known as 'police power' is concededly an inherent attribute of State sovereignty. * * * As generally understood it operates in

> a conceded sphere relating to public safety, order and morals for the protection of health, person and property, which is never questioned; but with changing conditions and requirements of our modern civilization, increasing regulatory and restrictive legislation has expanded its application to new subjects and demands presenting a debatable sphere where compulsory control borders the line of claimed constitutional rights and private freedom of action."

In *People* v *Raub, supra*, at 119, this Court commented on the exercise of the police power,

> "Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction."

In passing on the validity of "police power" legislation, courts give great deference to the legislative judgment. The Supreme Court stated in *Carolene Products Co* v *Thomson*, 276 Mich 172, 178; 267 NW 608 (1936),

> "The primary determination of public need and character of remedy in the exercise of the police power is in the legislature. Unless the remedy is palpably unreasonable and arbitrary so as needlessly to invade property or personal rights as protected by the Constitution, the act must be sustained. The presumption favors validity and, if the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted."

There is a two-step inquiry: (1) whether there is a valid public purpose, and if so, (2) is there a reasonable relationship between the remedy adopted and the public purpose?

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Public Purpose. The preamble of the act[1] indicates what the act does but does not suggest a purpose. In *Mask v Shell Oil Co,* 77 Mich App 25; 257 NW2d 256 (1977), another panel recently construed the statute but they did not examine the statutory purpose nor did they pass on the constitutionality of the legislation.

We believe the clear purpose of the statute is to encourage development of valuable oil and gas reserves. The need for developing existing energy sources and creating new sources is even more crucial today than when the act was passed in 1963.

Because the surface owner can never acquire any of the severed oil or gas by adverse possession,[2] legislation was required to prevent unknown and widely scattered heirs from preventing development of subsurface resources by inaction. The formidable task facing the surface owner in locating unknown heirs to valuable oil and gas deposits is outlined in Street, *Need for Legislation to Eliminate Dormant Royalty Interests,* Vol 42, No 3, Michigan Bar Journal, 49 (March 1963). At least five other states, Florida,[3] Illinois,[4] Indiana,[5] Nebraska[6] and Virginia,[7] have adopted similar legislation. In discussing the rule that prevents the surface owner from adversely possessing the

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[1] "AN ACT to provide for the termination of dormant oil and gas interests in land owned by persons other than the owners of the surface and for the vesting of title to same in the surface owners in the absence of the filing of a notice of claim of interest within a specified period of time."

[2] *See generally,* 1 Williams and Meyers, Oil and Gas Law, Adverse Possession and Trespass, § 224.1, p 344.

[3] FSA § 704.05.

[4] Smith-Hurd Ill Ann Stat, § 30:197—30:198.

[5] Ind Code of 1971, § 32-5-11-1 to § 32-5-11-8.

[6] Rev Stat Neb 1943, § 57-228 to § 57-231.

[7] Va Code, § 55-154 to § 55-155. Held constitutional in *Love v Lynchburg National Bank & Trust Co,* 205 Va 860; 140 SE2d 650 (1965).

subsurface rights after severance, treatise writers Williams and Meyers point out:

> "While the rule appears to be sound enough from the mineral owner's point of view, it can cause economic inconvenience to the public. Severed minerals cannot be developed until the owners consent to their development. The older the severence (and many go back to the 19th century), the greater the difficulty in locating the owners. The problem is further complicated if the severance was of small undivided mineral interests, as was common for speculation purposes in some areas in the 1920's. Present development of such areas depends upon obtaining the consent of nearly all the mineral owners, a task that could involve locating thousands of persons." 1 Williams & Meyers, Oil and Gas Law, Adverse Possession and Trespass, § 224.1, p—

Another commentator has analyzed the problem and has suggested legislative action.

> "It is generally accepted to be sound policy for a new oil and gas producing state to facilitate the rapid development of its oil and gas resources. The most effective way such a policy can be implemented is to force the owners of severed oil and gas interest to produce or lose their rights. This policy precludes any attitude of protecting at all costs the owner of a severed oil and gas interest and requires an avowed judicial and legislative intention not to tie up the development of these resources for an indefinite period of time. Thus, in a new oil and gas producing state the public would best be served by allowing the severed oil and gas interest in addition to the surface ownership to enure to an adverse possessor of only the surface after the prescriptive or statutory period has expired." Silver, "Mines and

Minerals-Oil and Gas-What Constitutes Adverse Possession of Severed Mineral Interest by Surface Possessor," 17 Ala L Rev 126, at 130 (1964). 1 Williams & Meyers, Oil & Gas Law, Adverse Possession and Trespass, § 224.1, fn 8.1, p 345.

It cannot be disputed that the public benefits from the development of oil and gas reserves. Likewise the public is harmed when unknown and uninterested heirs are able to frustrate oil and gas development by their inaction. As noted earlier, courts give great deference to the Legislature in determining the public need. We conclude that the dormant minerals act has a clearly valid public purpose—to encourage exploration for, and extraction of, needed oil and gas.

Relationship Between Remedy and Purpose. It is true that the operation of the statute is not exactly like, though perhaps similar to, a statute of limitation, a recording act or marketable title acts. However, the fact that the Legislature has opted for a unique remedy for a difficult problem is not fatal.

There were several complex problems facing the Legislature in divising a solution. First there was an inherent problem of how to deal with subsurface oil and gas rights which are incapable of physical possession. Of course if the owners of those rights were extracting oil and gas or transferring their rights, there would be no difficulty in ascertaining ownership. The problem arose, however, when the owner or owners of the subsurface rights had done nothing to indicate ownership and this problem was particularly acute when the owners were unknown heirs of former owners.

Essentially the act creates a rebuttable presumption that the owner of the subsurface rights has abandoned them if he

or she has done nothing to indicate ownership. The presumption is rebutted by the owner doing any one of a number of acts which would indicate ownership sometime within a 20-year period. The requirements of the act place a minimal burden on the owner of the oil and gas rights to do *something* to indicate ownership and if the owner fails to carry that minimal burden, the law deems his rights abandoned. In essence, the act creates a statutory conclusive presumption of abandonment. Unlike a commonlaw presumption, which may not be "conclusive" and may be rebutted by testimony, *In re Mecure Estate*, 391 Mich 443, 448; 216 NW2d 914 (1974), a statutory conclusive presumption may not be rebutted by other evidence. *Pearo* v *Mackinac Island*, 307 Mich 290; 11 NW2d 893 (1943). Conclusive presumptions established by statute are reviewed under the "arbitrary or capricious" standard. *In re Mecure Estate, supra* at 448. We conclude that there is a rational connection between an oil and gas owner's inaction for 20 years and the presumption of abandonment, *People* v *Bankston*, 78 Mich App 733, 736; 261 NW2d 39 (1977), and that the presumption is not arbitrary or capricious.

We hold that the dormant minerals act is a valid exercise of the police power. By failing to comply with the minimal requirements of the statute, defendants have abandoned their rights.

Defendants raise two other issues with which we deal summarily. Specifically defendants argue the act unconstitutionally impairs the obligation of contract and that the act denies equal protection of the laws.

The United States Supreme Court has stated that the constitutional limitation on a state's power to impair the obligation of contract is not to be read with mathematical

exactness and that "it is not every modification of a contractual promise that impairs the obligation of contract". *El Paso* v *Simmons*, 379 US 497, 506-507; 85 S Ct 577; 13 L Ed 2d 446 (1965), *reh den*, 380 US 926; 85 S Ct 879; 13 L Ed 2d 831 (1965), *Washtenaw Community College Education Ass'n* v *Board of Trustees of the Washtenaw Community College*, 50 Mich App 467, 472; 213 NW2d 567 (1973), *Michigan Transportation Co* v *Secretary of State*, 41 Mich App 654, 663; 201 NW2d 83 (1972), *lv den*, 389 Mich 767 (1973). In each case where there is an alleged impairment of the obligation of contract, the state's economic interests and sovereign right to protect the general welfare of the people must be balanced against the constitutional limitation. *Washtenaw Ass'n, supra* at 472, citing *El Paso, supra* at 508. In another United States Supreme Court case, *Home Building & Loan Ass'n* v *Blaisdell*, 290 US 398, 437; 54 S Ct 231; 78 L Ed 413 (1934), the Court stated:

> "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

See *Metropolitan Funeral System Ass'n* v *Commissioner of Insurance*, 331 Mich 185, 195; 49 NW2d 131 (1951), *Keefe* v *Oakland County Drain Commissioner*, 306 Mich 503, 512-513; 11 NW2d 220 (1943), *aff'd* 332 US 393; 64 S Ct 1072; 88 L Ed 1346 (1944).

In another case involving a challenge to a statute which allegedly impaired the obligation of contract, this Court stated:

> "Where there is a valid exercise of the state's police power which only incidentally affects the existing contract then the state enactment is not prohibited."

Brda v *Chrysler Corp*, 50 Mich App 332, 335; 213 NW2d 295 (1973).

In applying the standards set forth in the above cases, we conclude that the dormant minerals act does not unconstitutionally impair the obligations of contract. We have already concluded that the act represents a legislative judgment that encouraging oil and gas exploration is in the public welfare and that the act is a valid exercise of the state's police power. The statute does not prevent the defendants from enforcing any contract with the plaintiff, but rather requires defendants to indicate their continuing interest in the oil and gas rights by complying with the minor registration requirements of the statute. Because the act is a valid exercise of the police power which imposes only a minimal burden on defendants, the Legislature has not unconstitutionally impaired the obligation of contract.

Although the defendants did not raise their equal protection argument at trial court level, we address it briefly on appeal. Since the act does not involve any suspect classification, the proper standard of evaluation is the "rational basis" test. *Cruz* v *Chevrolet Grey Iron Division of General Motors Corp*, 398 Mich 117, 128-129; 247 NW2d 764 (1976), *Schigur* v *Secretary of State*, 73 Mich App 239; 251 NW2d 567 (1977). The defendants argue that the act denies equal protection because it applies only to gas and oil and not other minerals. We disagree. The Legislature has placed a high priority on development of oil and gas. Perhaps in the future the need for other minerals may be as great as the current need for oil and gas and at that time special legislation may be enacted. However, the equal protection clause does not require the Legislature to choose between addressing every aspect of a problem or not addressing the problem at all. *Manistee Bank & Trust Co* v *McGowan*, 394 Mich 655, 672; 232 NW2d 636 (1975). There is a rational basis between the legislative policy of encouraging oil and gas development and the statutory scheme adopted to carry out that policy. Further the act

treats all those similarly situated equally; all owners of severed oil and gas rights run the risk of abandoning their rights if they do not comply with the statutory requirements. Defendants have not been denied equal protection of the laws.

We hold the dormant minerals act, MCL 554.291 *et seq.*; MSA 26.1163(1) *et seq.*, to have a legitimate public purpose, to be a valid exercise of the police power and to be constitutional. In view of our disposition we need not address the other issue raised by plaintiff.

Reversed and remanded. No costs, constitutionality of a statute being involved.

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF THE
COUNTY OF KALKASKA

H. JOHN VAN SLOOTEN,
Plaintiff,

-vs-

File No. 75-723-CH

MYRTLE LARSEN, et al,
Defendants,

OPINION

This is a matter submitted on agreed statement of facts, involving a single question of law, the constitutionality of the so-called "Dormant Mineral Act," 1963 PA 42 (MCLA 554.291 et seq.; MSA 26.1163 et seq.).

On April 23, 1943, Nellie Gill, fee owner of 40 acres of land in Kalkaska Township, Kalkaska County, conveyed the same "excepting and reserving to herself and her heirs all of the oil and mineral rights. . . ." and which deed of conveyance was recorded August 7, 1945. Plaintiff is the successor in interest of the grantee in said deed, acquiring his interest by deed dated January 2, 1959 and recorded Jan. 26, 1959. Mrs. Gill is deceased and the several defendants are her heirs.

Briefly stated, Act 42 deems severed gas or oil interests abandoned and vested in the surface owner or owners where, for a 20 year period, those interests have been dormant, i.e., where they have not been the subject of recorded instruments or of specified exploration or production activity.[1] Section 2 of the Act provides that such severed interests may be preserved for 20 years by filing of

a written notice with the Register of Deeds, which notices may by successive filing preserve the severed interests indefinitely:

The agreed statement of facts indicates that for a period in excess of 24 years[2] from the 1945 recording of the severing deed, none of the events of exploration or production specified in the act occurred, nor were any interests conveyed by recorded instrument; neither did Mrs. Gill or any of her heirs file the notice required by Section 2 of the Act to preserve the severed interests. Thus, if Act 42 is constitutional, the severed interests were abandoned and vested in the surface ownership now held by plaintiff, and recent leases executed by defendants have no effect.

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[1] MSA 26.1163 (1):

Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or the use of such interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer of record of such interest or within 20 years after the last issuance of a drilling permit as to such interest or actual production or withdrawal of oil or gas, from said lands, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership.

The phrase "drilling permit" shall mean a permit to drill an oil or gas well issued by the conservation department or its successor.

[2] And beyond the statutory grace period of 3 years after the effective date of the act.

There is no question but that the severed oil and gas constitutes a freehold property interest, *Rathbun* v *Michigan*, 284 Mich 521 (1938), protected by the federal and state constitutional prohibitions against the taking of private property without due process and impairment of contract. One of the purposes of the federal constitution, described in *Calder* v *Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798) as the social compact, was the preservation of the right of private property. In that early opinion, the dicta of Justice Chase said, at p. 388, "An act of the legislature (for I cannot call it a law) contrary to the great first principle of the social compact, cannot be considered a rightful exercise of legislative authority. (Such as) . . . a law that takes property from A and gives it to B."

The example chosen by Justice Chase in 1798 of what a legislature could not constitutionally do, is precisely what the Michigan legislature has attempted by Act 42 to do, namely take the property of defendants and give it to plaintiff. There is no valid police power served thereby. The legislature, it is true, may govern the forms of property interest and the means of dealing therewith. So, had it chose to do so, it could have prospectively barred the severance of surface and subsurface interests. Instead, it has sought to involuntarily rejoin some but not all interests, excluding: those other than oil and gas (thus defendants would continue to own minerals other than oil and gas); those owned by governmental bodies and agencies; those transferred, mortgaged or leased within the statutory period; those as to which there has been exploration and/or exploitation operations within the statutory period; and those as to which the Section 2 notice has been filed.

Unlike marketable title acts, it is clear that this is not an act curative of mere title defects or flaws. Neither is it a procedural act, nor a statute of repose. It does not merely lay to rest and bar an ancient claim or right to legal remedy of one who has failed to pursue such claim or remedy within a reasonable time. Instead it takes property from the

owner in constructive possession, whose title is clear, and gives it to one who has no claim or interest thereto.

> In *Groesbeck* v *Seeley*, 13 Mich 329 (1865), the Court said,
>
> ". . . The only manner in which a party holding a lawful and vested right in property can be prevented from asserting it against one which was not lawful in its inception, is by the operation of limitation laws. These laws do not purport to take away existing rights, although their operation may often have substantially that result. But they are designed to compel parties whose rights are unjustly withheld from them to vindicate their claims within some reasonable time. If a person who has been ousted of his possession or dominion desires to regain it, he knows that he must resort to those means which are furnished by the law, either by the peaceable act of a party himself, or by legal prosecution. A limitation law simply requires him to proceed and enforce these rights within some reasonable time, on pain of being deemed to have abandoned them. Such laws can only operate on those who are not already in the enjoyment and dominion of their rights. A person who has a lawful right, and is actually or constructively in possession, can never be required to take active steps against opposing claims.

The Court concludes that the act is violative of Article 1, Section 10, and Section 1 of the 14th Amendment of the United States Constitution, and Sections 10 and 17 of Article 1 of the Michigan Constitution. Judgement may enter for defendants accordingly.

Dated: May 9, 1977

(s) William R. Peterson
WILLIAM R. PETERSON,
Circuit Court Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KALKASKA

H. JOHN VAN SLOOTEN,
Plaintiff,

-vs-

File No. 75-723-CH

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legatees, and assigns of NELLIE F. GILL, deceased,
Defendants,

JUDGMENT

At a session of said Court held on the 23rd day of May, 1977, in the City of Cadillac, County of Wexford, State of Michigan.

PRESENT: HONORABLE WILLIAM R. PETERSON,
Acting Circuit Court Judge for Kalkaska County

Appendix D–Judgment

Plaintiff, H. John Van Slooten, by and through his attorneys, Thompson & Zirnhelt, and Defendants Myrtle Larsen, et al, by and through their attorneys, Dreyer & Braeuninger, having stipulated to the facts by Stipulation of Facts, dated May 12, 1976, and written Briefs having been submitted by the respective attorneys for Plaintiffs and Defendants and the Court having reviewed the pleadings, Stipulation of Facts and written Briefs and the Court being fully advised in the premises and the Court having rendered its Opinion dated May 9, 1977, containing findings of fact and conclusions of law and said Opinion having determined that Public Acts 1963, No. 42 (MCLA 554.291 et seq.; MSA 26.1163 et seq.) is unconstitutional because violative of the impairment of contract requirements of Article I, Section 10 of the United States Constitution and Article I, Section 10 of the Michigan Constitution and because violative of the due process requirements of Section 1 of Amendment XIV of the United States Constitution and Article I, Section 17 of the Michigan Constitution and said Opinion having provided that a Judgment may be entered for Defendants Myrtle Larsen, et al.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff H. John Van Slooten as to his Complaint has no cause for action against Defendants Myrtle Larsen, Ruth Armstrong, Mary Kinnison, Elsie M. Dick, Alice C. Pearson, Helen Wagner, Mary Hyatt, Eleanor Hall, Faye Petrak, Jean Tenore, Earl Osborn, Jack Osborn, Bill Osborn, Marva Engle, Kent Osborn, James Osborn, Susan Decent, Gwendolyn Gill, Joyce A. Hall, Lois J. Beatty, James G. Dick, Terrel B. Dick, Gerald A. Dick, Virginia A. Cummings, Ronald G. Dick, Gloria Henderson, Lester Teater; unknown claimants; unknown owners; and any and all unknown heirs, devisees, legatees, and assigns of Nellie F. Gill, deceased; and

IT IS FURTHER ORDERED AND ADJUDGED that fee simple absolute title as to the oil, gas and other mineral rights in that certain real property described as:

> The SE 1/4 of the SE 1/4 of Section 14, T27N, R7W, Kalkaska Township, Kalkaska County, Michigan.

is quieted in the heirs, devisees, legatees and assigns, if any, of Nellie F. Gill, deceased, in accordance with and to the extent of their respective individual legal relationship to said Nellie F. Gill and in the event and to the extent any of the aforesaid heirs, devisees, legatees and assigns, if any, of Nellie F. Gill deceased, are likewise deceased, then in their respective heirs, legatees, devisees, and assigns, if any, in accordance with and to the extent of their respective individual legal relationship to said deceased heir, devisee, legatee and assign, if any, of Nellie F. Gill, deceased.

IT IS FURTHER ORDERED AND ADJUDGED that costs shall be taxed to Plaintiff H. John Van Slooten.

(s) William R. Peterson
Acting Circuit Court Judge for Kalkaska County

True Copy
Attest: (s) Rina Uitvlugt
County Clerk

Appendix E–Final Judgment

STATE OF MICHIGAN
IN THE SUPREME COURT

SC 61917

H. JOHN VAN SLOOTEN,
Plaintiff-Appellee,

CoA 77-1225

-vs-

LC 75-000877 CH

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legatees, and assignees of NELLIE F. GILL, deceased,
Defendants-Appellants,

FINAL JUDGMENT

This cause having been brought to this Court for appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been heard thereon by the Court.

IT IS HEREBY ORDERED that the Judgment of the Court of Appeals is affirmed and the cause is remanded to the Circuit Court for the County of Kalkaska for further proceedings in conformity with the Opinion filed herein. No costs are to be taxed.

Appendix F–Notice and Certificate

STATE OF MICHIGAN
IN THE SUPREME COURT

H. JOHN VAN SLOOTEN,
Plaintiff-Appellee,

No. 62256

-VS-

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legatees, and assignees of NELLIE F. GILL, deceased,
Defendants-Appellants,

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware corporation, SKELLEY OIL COMPANY, a Delaware corporation, TOTAL LEONARD, INC., a Michigan corporation, THE DOW CHEMICAL COMPANY, a Delaware corporation, SAXON OIL COMPANY, a Texas corporation,
Plaintiffs-Appellants,

-VS-

No. 61917

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware corporation, DELORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY,
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Myrtle Larsen, Ruth Armstrong, et al, the heirs of Nellie F. Gill, the Defendants and Appellants in No. 62256 above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan, affirming the entry of judgment in favor of Plaintiff-Appellee, entered in this action on December 23, 1980.

This appeal is taken pursuant to 28 U.S.C Section 1257(2).

Dated: March 12, 1981

(s) James D. Dreyer
DREYER & DUBOIS
Attorneys for Defendants-Appellants
Business Address:
Suite 302
Gaylord State Bank Prof Bldg
Gaylord, Michigan 49735

CERTIFICATE OF SERVICE

I, James D. Dreyer, certify that all parties required to be served with this Notice of Appeal have been served. I have this day caused copies of this Notice of Appeal to be deposited in a United States mailbox, with first-class postage prepaid, addressed to their counsel of record, whose names and post offices addressed to their counsel of record, whose names and post offices addresses appear below:

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Dated: March 12, 1981

(s) James D. Dreyer
Attorney for Defendants-Appellants

Office-Supreme Court, U.S.
FILED
APR 30 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1624

IN THE
UNITED STATES
SUPREME COURT

October Term, 1980

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAY PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LEASTER TEATER, unknown claimants, unknown owners, and any and all unknown heirs, divisees, legatees, and assigns of NELLIE F. GILL, deceased,

Appellants,

-vs-

H. JOHN VAN SLOOTEN,

Appellee.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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MOTION TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS

Appellee, H. JOHN VAN SLOOTEN, Pursuant to Rule 16.1 (b) of the Rules of the Supreme Court of the United States, and moves this Court to dismiss the Appellants' appeal in this matter, filed under 28 USC 1257 (2), 1976, or, in the alternative, to affirm the decision of the Supreme Court of the State of Michigan in *Van Slooten* v *Larsen, et al*, 410 Mich 21; 29 NW 2d 704 (1980), on the grounds that, as hereinafter set forth.

STATEMENT

This is an appeal from a final decision of the Michigan Supreme Court. The Michigan Supreme Court had before it the question of the constitutionality of that state's dormant mineral act.

Following are the stipulated facts, as presented to the trial court:

1. The premises which are the subject to this action are described as the Southeast Quarter of the southeast Quarter (SE ¼ SE ¼) of Section 14, Township 27 North, Range 7 West Kalkaska Township, Kalkaska County, Michigan.

2. Nellie F. Gill, ancestor of all the known defendants to this action, by Warranty Deed dated April 32, 1943, recorded August 7, 1945 in Liber 53 at Page 401, conveyed said premises but expected from said conveyance and reserved unto herself and her heirs all of the oil and mineral rights in and on said aforedescribed premises.

3. Through mesne conveyances John Van Slooten, being one and the same H. John Van Slooten, plaintiff herein, acquired title to the subject premises by Quit Claim Deed dated January 2, 1959,

recorded January 26, 1959 in Liber 81 at Page 376. Plaintiff to date has not conveyed any of his interest acquired by said Quit Claim Deed.

4. That on June 29, 1970, being in excess of 24 years since the aforedescribed reservation of oil and mineral rights, the first recorded instrument affecting or asserting an interest in the aforedescribed reservation was recorded being an oil and gas lease from Elsie M. Dick, one of the defendants herein, to Pan American Petroleum Corporation, and recorded in Liber 114 at Page 559 and 560.

5. Thereafter all the defendants or their ancestors executed oil and gas leases in favor of Pan American Petroleum Corporation or its successor in interest, Amoco Production Company.

6. With regard to the aforedescribed oil and mineral rights reserved by Nellie F. Gill, no drilling permit has been issued, nor has actual production occurred, nor has withdrawal of oil or gas from said lands, nor from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operation therewith, nor has such interest been used in underground gas storage operations during the 20 year period immediately following August 7, 1945.

7. Neither Nellie F. Gill nor her heirs have recorded a written notice in the Register of Deeds Office for Kalkaska County during the 20 year period immediately following August 7, 1945, nor during the three year period immediately following September 6, 1963, stating that they, or any of them, desire to preserve the aforesaid interest and do not intend to abandon the same.

The Michigan dormant mineral act was passed in 1963. It provided a three year period during which mineral in-

terest owners outstanding at that time could register their interest.

The trial court found the act unconstitutional. The Court of Appeals reversed, and the Michigan Supreme Court affirmed the Court of Appeals decision.

ARGUMENT

This case presents no substantial federal question for this Court to decide because similar related laws have been previously considered by this Court, and found to be constitutional. The Michigan dormant mineral act, MCLA 554.291 et seq.; MSA 26.1163 (1) et seq., which was found by the Michigan Supreme Court to be constitutional, has its origins firmly rooted in what can be characterized as "black letter law", that is, the American system of recorded land titles and marketable title legislation, and statutes of limitation. These laws, i.e. recording acts, marketable title acts, and statutes of limitation, have been, generally, upheld as constitutional by this Court and the courts of several states.

In order for this court to take jurisdiction under 28 USC 1257 (2) there must be involved a substantial federal question. There is no substantial federal question where the issues have been decided by previous decisions of this Court. *Utley* v *St. Petersburg*, 202 US 107, 786 L Ed 1155 (1933).

As noted by the Michigan Supreme Court, the constitutionality of recording statutes has already been decided by the United States Supreme Court, *Van Slooten*, supra, p. 47, citing *Jackson* v *Lampshire*, 28 US 280, 7 L Ed 679 (1830).

The purpose of recording acts is to protect the subsequent bona fide purchaser. This increases the alienability of land which in turn promotes its utlilty and development. Furthermore, they extinguish certain unrecorded interests, thus reducing possible litigation and giving a finality to

apparent circumstances. The penalty provided for failure to record is complete divestiture of title or of the interest.

The purpose of the Michigan dormant mineral act is "to facilitate the development of oil and gas resources," *Van Slooten, supra,* at 43; citing Street, "Need for Legislation to Eliminate Dormant Royalty Interests", 42 Mich State Bar J. 49 (March, 1963). It accomplishes this purpose by requiring holders of the severed oil and gas interest to either do any one of the enumerated acts respecting the oil and gas, or record a simple notice of claim of interest, at least once every (20) years. The penalty for failure to do any of those acts or record such notice is divestiture of the severed oil and gas interest.

Appellants attempt to distinquish the Michigan dormant mineral act from a recording act by arguing that the prior purchaser, divested of his interest or title under a recording act, has a cause of action against the seller. What the Appellants fail to recognize is the unique character of property. A purchaser does not wish merely to have his consideration returned. He wants the specific piece of property contemplated by his transaction. A purchaser of property is one of the few people for whom the law provides the remedy of specific performance. The recording statutes, just like the dormant mineral act, completely divest one person of his vested property right in favor of another. Yet the recording statutes have passed the constitutional tests. "So far as the writer knows, the constitutionality of the recording acts has never been seriously questioned." Aigler; "Constitutionality of Marketable Title Acts", 50 Mich Law Rev. 185, 197.

In discussing marketable title acts, Professor Aigler said:

> "These statutes, though varying in detail, have a common objective-the extinguishment in favor of certain persons of claims against, and interest in, land, which claims and interest arose out of events

> and transactions that occurred many years ago, unless such claims or interest have been preserved by the recording of a preserving notice within the period of time." Aigler, supra, at 185.

That description applies equally to the Michigan dormant mineral act. The Van Slooten court, correctly, percieved this analogy and stated ". . . . . it is sufficient to recognize at this point that statutes imposing recording requirements have been upheld when a reasonable time is provided for recording existing interests," *Van Slooten, supra*, at 47. In fact, the Michigan Court accepts the authority of the state to require periodic recording as a "given". "There is nothing inherent in a recording act which mandates that a recording be eternally effective, *Van Slooten, supra*, at 48, citing *America Land Co.* v *Zeiss*, 219 US 47; 47 S Ct 200; 55 L Ed 82 (1911).

In a leading case in this area, the Minnesota Supreme Court upheld that state's marketable title act in *Wechelman* v *Messner*, 250 Minn, 88; 83 NW 2d 800 (1957).

In Iowa, the Supreme Court of that state, applying its marketable title act, assumed its validity, *Lytle* v *Guilliams*, 41 NW 2d 668 (1950).

Marketable title acts are intended to shorten the period of a necessary title search and to make the record for that shortened period a safe and reliable record. *Aigler, supra*, p. 196. Marketable title acts are a legislative attempt to make repeated title searches less cumbersome, time consuming and expensive. A similar public policy supports the need for and the constitutionality of the Michigan dormant mineral act.

In Michigan, as in many other states, a mineral interest can be severed from the surface estate so that the oil and gas rights can be held by one person while the surface is owned by another often unrelated person. Frequently, these oil and gas rights, when severed, are divided between several persons in order to spread the cost of acquiring

these rights. In addition, owners of mineral interests often will acquire and convey interests in several parcels in order to enhance the probability of a return on their investment or simply to profit from the sale of the mineral interest rather than from the recovery and production of the mineral involved. Over long periods through formal conveyances or distribution following death of the interest holder, it is common that the mineral interests for a particular section will be held in small fractions by many people. Because of the numerous conveyances of these mineral interests the holders of these interests are often unacquainted with each other. This situation presents a difficulty of any owner of a fractional oil and gas interest who wishes to develop the potential oil and gas resources in the land. Many times the other mineral rights owners cannot be located. Tax assessment rolls are of no help since, in this state, the severed oil and gas interest owner pays no property tax on his interest. Often these people are spread over the entire country. Not even local inquiry will be of much assistance in locating the severed interest holders or their heirs.

In those situations when not all of the owners of the oil and gas rights can be located, the developer is faced with the question of whether to drill without their consent and participation. If he does drill and finds no oil or gas, the expense of a dry hole is borne by him and the other consenting owners and the missing owners avoid paying their fair share of the project. If he drills and finds oil or gas, the missing owners may come forward at a later date and will have a legal right, of course, to participate in the proceeds of the well. Had they been a part of the project before the drilling began, their share of costs and profits would have been negotiated and settled by agreement. After drilling has been completed however, there would be none of the certainty, established by pre-drilling contracts, as to the nature and extent of each owners interest. Given the substantial revenue oil and gas wells often produce, it becomes economically feasible to litigate every potential claim of this sort.

In addition, and, most importantly, given the enormous costs involved in drilling an oil and gas well, financial institutions or other investors are unwilling to become involved in a drilling project without the certainty pre-drilling contracts with ALL owners provide.

It has thus become the pattern in Michigan that no drilling take place unless all interests are located.

In addition, unlike many other minerals, oil and gas are uniquely difficult to isolate with certainty before exploration. A driller uses techniques of geological probing to tell where mineral reservoirs are likely, but even the best of these are uncertain. With a background of such uncertainty unless all the interests can be accounted for, the expensive testing or drilling to determine the likelihood of oil and gas in an area will probably never take place as little value will be seen in a test providing encouraging geologic information if the owners cannot be located. Thus, it follows again that if the owners cannot be found, the tests won't be run and wells won't be drilled.

Finally, since oil and gas fields do not conform to property lines and geologic testing is done over large areas, if certain portions of a field's potential oil and gas are held by unlocated owners, the testing in the whole field may not be done. Therefore, the owners of contiguous and nearby lands may well be deprived of having their land tested and developed because of the existence of dormant interests in the surrounding lands. However, should the contiguous holder be in a position to drill, it is highly likely that an injustice will occur because the well on the contiguous property may drain the whole reservoir which underlies both properties and, thus, deprives the owner, who cannot locate his co-owners, of any return. With other minerals, such as gravel or coal, an injustice of this sort would not be possible as the minerals cannot "traverse" the property lines as do oil and gas.

The dormant mineral act also may be said to be in the nature of a statute of limitations, and as such, represents an

adoption of the English approach to adverse possession and limitation statutes.

> "In England the chief emphasis has been upon the laches of the old owner and the barring of his remedy. The American view has instead emphasized the merit of the one in possession and has lead to an affirmative approach; i.e. has the person in possession acquired title rather than has the one out of title lost it. Thus, while the English view seeks to penalize an owner who has slept on his rights, American courts are more impressed with quieting a title which deserves protection." Brodwell, "Disseisen and Adverse Possession", 33 Yale L. J.1, 4-11 (1923), Mosburg, "Statutes of Limitation and Title Examination", 13 Okla L. Rev. 125 (1960).

The Michigan dormant mineral act establishes a limitation period beyond which no owner can go to establish title by constructive possession of record.

Despite the fact that statutes of limitation rarely define the characteristics of occupancy which will elevate the occupancy to the status of adverse possession, these requirements have been added by judicial construction.

Other statutes, such as the dormant mineral act, set out the requirements necessary to extinguish the title to the estate covered by the act.

One such statute setting out specific acts to deal with estates in land with unique characteristics was considered by this Court in *Soper* v *Lawrence Bros. Co.*, 201 US 359, 50 L Ed 788 (1905).

The Maine statute involved there (Maine Public Laws of 1805, Chap. 162 §1 & §4) was enacted to deal with estates in Main wild land—land not readily susceptible to possession by means of the usual acts theretofore required of the adverse possessor. It was found not to violate 14th Amendment standards.

Similarily, the Michigan dormant mineral act was enacted to deal with estates in oil and gas—estates not readily susceptible to possession by an adverse possessor.

In each instance the estates are such that the owner may virtually abandon them with little or no chance of losing them to an adverse possessor. And, in each statute the emphasis is on an absence of acts indicative of ownership, failure on the part of the true owner to assert his ownership.

This Court held that the legislature may create a hostile claimant to a lawful, vested property interest. In effect the Court held it to be within the power of the state to take certain acts regarding a presence on the land theretofore constituting a mere trespass, and elevate those acts to the status of disseisor.

> "The distinction between trespass and disseisin may be modified by statute as properly as it may be established by common law. Also statutes of limitation may be passed where formerly ther were none." *Soper* v *Lawrence Bros. Co.*, 201 US 350, 367, 50 L Ed 788, 791 (1905).

The significance of the omission of the owner to do any acts of ownership is also found in *Soper* v *Lawrence Bros. Co., supra*, at page 370:

> "Some objection was made to the effect given to a tax deed in the first part of the section. But that is not before us. We see nothing to indicate an intent to go beyond the law. *Marx* v *Hanthorn*, 148 US 172, 37 L Ed 410; 13 Sup, Ct. Rep. 508. As to the possibility that the taxes may have been assessed unlawfully or the recorded deed under which the defendant claims forged, it is admitted that such matters might be proved. As they are public facts, give color to the overt acts done upon the land, and MUST BE ACCOMPANIED BY A NECESSARY CONSCIOUS OMISSION OF THE PLAINTIFF

TO PAY TAXES OR DO ANY ACT OF OWNERSHIP, we see nothing to hinder the legislature making them sufficient, prima facie, at lease, to set the statute running and to put the former owners to a suit." (Emphasis Added)

The absence of an assertion of a hostile claim in the traditional sense is balanced by providing a relatively simple method to avoid the effects of the statute. The party against whom adverse possession in the traditional sense runs must re-enter, usually by means of a suit to recover possession. The Maine Statute made adverse possession of Maine wild lands possible by means of acts theretofore constituting a mere trespass, but the owner could likewise avoid the effects of this statute by relatively simple means, i.e. payment of taxes or doing acts of ownership. *Soper* v *Lawrence Bros. Co., supra* at page 370. The Michigan dormant mineral act can be avoided by merely recording a notice as well as by doing the acts indicative of actual or constructive possession set out therein. In addition, the dormant mineral act provides for simple re-recording which, in effect, allows a person to hold his severed oil and gas interest perpetually.

The dormant mineral act's definition of abandonment does not directly affect or interfere with the owner's domimion or indefinite right of user, control, and disposition. The act's effect on property is like that of adverse possession laws relating to color of title which do not constitute a deprivation of property without due process of law.

Like a statute of limitation, the Michigan dormant mineral act should be viewed as a procedural matter, and not, therefore, affecting substantive rights. It only changes the remedies by which those substantive rights are enforced. Bubalo, "Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act" 12 Ind. Law Rev. 455,462, and cases cited therein.

In a not unrelated matter, in *Selectmen of Nahant* v *United States*, (1968, D.C. Mass.) 293 F. Supp. 1076, the

court upheld the constitutionality of a statute which requires the timely recording of a possibility of reverter to prevent its extinguishment or to toll the running of a special statute of limitations.

Appellants have argued in their jurisdictional statement that, by the dormant mineral act, the state is taking title to oil and gas from one person and giving it to another without providing procedural or substantive due process. Appellee contends that there is no taking involved here, and, if there is, the appropriate due process considerations have been met.

Appellants liken the dormant mineral act to an eminent domain proceeding. In support of their argument they cite *Pennsylvania Coal Co.* v *Mahan*, 260 US 393 (1922); *Penn Central Trans. Co.* v *New York City*, 438 US 104, 127, reh. denied, 439 US 883 (1978) and *Northern Cheyenne Tribe* v *Hollowbreast* 425 US 649 (1976). Each of these cases, however, involved a taking of property, although *Northern Cheyenne* involves a non-vested interest.

The Michigan dormant mineral act takes no property. It merely places certain responsibilities on the owner of a severed oil and gas interest. The day after the act became effective every owner of a severed oil and gas interest in property in Michigan still held their respective interest, regardless of when created. Only failure to record the notice of claim, or do any of the enumerated acts, within the prescribed period, will cause the transfer of that interest. It is not a governmental act which deprives a person of his property, it is the failure of the property owner to fulfill his responsibilities under the law which results in divestiture. Just as failure to record a deed may result in loss of property, so too, under the dormant mineral act, failure to act will result in loss of property. See *Turner* v *New York*, 168 US 90, 18 S Ct 38 (1897).

Persons owning land have been and are generally assumed to be aware of their responsibilities under the law. Indeed, this Court has stated:

> "All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of property and of the procedure which they set up for those purposes." *American National Bank* v *Luckett*, 321 US 233, 243 (1944)

If the Court were to adopt the argument of Appellants then every legislative act which regulated property interests would have to be held in abeyance until the government, presumably, made a good faith attempt to notify all affected persons. This not only is absurd, but inordinately expensive, cumbersome and unnecessary. Neither has it ever been a constitutional requirement in the past. In *Goldblatt* v *Town of Hempstead*, 369 US 590 (1962) a city ordinance precluded excavation under the waterline. It extinguished, in effect, certain mineral interests. This Court upheld that ordinance finding that there was no taking involved even though the mineral interests were essentially forfeited to the town's use.

Appellants may argue that *Goldblatt, supra*, is distinguishable in that no actual transfer of property took place there while under the dormant mineral act there is an actual transfer of title. But so too is there a transfer of title under the recording acts and the marketable title acts, yet these latter statutes are constitutional.

The due process requirements applicable in eminent domain proceedings aren't applicable to legislative acts. So long as there is a valid public purpose to the legislation, it applies to entire classes of persons similarly situated, and it is not merely a charade adopted in order to circumvent normal eminent domain proceedings these legislative acts should be upheld. Ultimately, there is a political solution available to the citizenry for ill advised action by their legislatives.

> "Where government plays the role of an impartial arbiter between the rights of competing societal interest groups, eminent domain safegaurds ought not to be implemented." Bubalo, supra, p. 477.

The Appellants reliance or *Mullane* v *Central Hanover Bank & Trust Co.*, 339 US 306 (1950) is inopposite. There the Court was faced with a taking of specific property as a result of a pending action. The Court required notice and a meaningful hearing.

The Van Slooten court held that the statute itself provides sufficient notice of its recording requirements. *Van Slooten, supra,* at 52,n. 28 and cases cited therein. Importantly, the statute does not preclude a judicial hearing to determine whether the statutory elements have in fact been met. Similarly, an adverse possession statute does not require a pre-deprivation hearing nor does it preclude an ultimate judicial determination of the operative facts. Given the countervailing need for and purpose of the statute, to facilitate the development of oil and gas interests, due process requires no pre-deprivation hearing here.

CONCLUSION

The Michigan dormant mineral act is merely an extension to the area of severed oil and gas interests of the same legal principals which have sustained, as constitutional, recording acts, marketable title acts and statutes of limitation. The act in question here has a valid public purpose. It does not violate either substantive or procedural due process standards. The appeal of Appellants should be dismissed or, in the alternative, the decision of the Michigan Supreme Court in *Van Slooten* v *Larsen et al.* should be affirmed.

Respectfully submitted,
PETER J. ZIRNHELT,
Attorney for Appellee